

STATE OF MICHIGAN
COURT OF APPEALS

In re Application of Consumers Energy Company
Re Big Rock Point Plant

CONSUMERS ENERGY COMPANY,

Petitioner-Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION,
ASSOCIATION OF BUSINESSES
ADVOCATING TARIFF EQUITY, ATTORNEY
GENERAL, MICHIGAN ENVIRONMENTAL
COUNCIL/PUBLIC INTEREST RESEARCH
GROUP IN MICHIGAN, and ENERGY
MICHIGAN, INC.,

Appellees.

UNPUBLISHED

January 24, 2012

No. 296853

Public Service Commission

LC No. 00-015611

Before: BECKERING, P.J., and OWENS and SHAPIRO, JJ.

PER CURIAM.

Appellant Consumers Energy Company (“Consumers”) claims an appeal from an order entered on February 8, 2010, by appellee Michigan Public Service Commission (“PSC”) requiring Consumers to refund \$85 million to customers as a result of overcollection of funds for the decommissioning of a nuclear power plant. We affirm.

I. Background

This case concerns Consumers’ application seeking approval of a reconciliation of the revenues and costs associated with the decommissioning of the Big Rock Point Nuclear Power Plant (“Big Rock”). Big Rock began commercial operation in 1963 and supplied electric power to Consumers’ customers. Big Rock’s operational license was set to expire in 2000.

In 1979, the PSC commenced a proceeding to establish guidelines for the decommissioning of Big Rock, a process that generally takes several years to accomplish (Case No. U-6150). The Attorney General and the Association of Businesses Advocating Tariff Equity (“ABATE”) were among the parties that participated in the proceedings. On August 26, 1986,

the PSC entered an order approving a settlement agreement reached by the parties. The settlement agreement provided for the establishment of an external trust fund to hold monies to be used exclusively for the decommissioning of Big Rock. The monies to be set aside in the fund would come from Consumers' customers via a surcharge. Beginning in 1990, and at three-year intervals thereafter, Consumers was required to file with the PSC a report detailing the adequacy of the decommissioning fund. The fund was required to meet several requirements, including:

- c. No part of the assets of the trust may be used for, or diverted to, any purpose other than to fund, in whole or in part, the costs of nuclear plant decommissioning or to pay administrative and other incidental expenses, including taxes, if applicable, of the fund.
- d. If any part of the contribution made to the trust is determined by the Commission to be in excess of the amount actually expended for decommissioning, after decommissioning has been completed, the excess jurisdictional amount shall be refunded to Michigan ratepayers, as determined by the Commission. Should the amount contributed to the trust be insufficient to cover the costs of decommissioning the utility may petition the Commission for relief.

Consumers proceeded according to the settlement agreement, sought and received approval for surcharges designated for the decommissioning fund, and filed reports regarding the status of the fund.

Consumers shut down Big Rock in 1997 and began the decommissioning process. In March 1998 Consumers filed an application with the PSC to reallocate the surcharges that funded the Big Rock decommissioning fund (Case No. U-11662). In an order entered on March 22, 1999, the PSC concluded that Consumers would have accumulated sufficient funds for the decommissioning of Big Rock by the end of the year 2000. Based on that determination, the PSC ordered Consumers to file revised tariff sheets indicating that the surcharge for the Big Rock decommissioning fund was authorized through December 31, 2000.

The Customer Choice and Electricity Reliability Act, 2000 PA 141, became effective in June 2000. Section 10d(1) of 2000 PA 141, MCL 460.10d(1), froze rates charged by utilities through December 31, 2003. On June 5, 2000, the PSC issued an order to implement MCL 460.10d(1) (Case No. U-12464). Ultimately, in an order entered on August 4, 2000, the PSC concluded that MCL 460.10d froze rates at their May 1, 2000, levels, and prohibited increasing or decreasing rates during the relevant period.

Consumers sought to clarify the status of the Big Rock decommissioning surcharge in light of the rate freeze authorized in MCL 460.10d and in light of the PSC's conclusion in Case No. U-11662 that by December 31, 2000, Consumers would have collected sufficient monies to fund the decommissioning process. The then-Director of the Electric Division of the PSC Staff advised Consumers to keep the surcharge in place and to note on its tariff sheets that after December 31, 2000, the surcharge no longer funded the Big Rock decommissioning process but rather would be designated as general corporate revenues. On September 12, 2000, Consumers

filed a tariff sheet that stated that although the Big Rock decommissioning surcharge “terminates December 31, 2000, the total charges remain the same thereafter due to the rate freeze provisions of 2000 PA 141.”

In September 2001 the PSC Staff completed a review of Consumers’ report on the adequacy of the Big Rock decommissioning fund. The review noted that Consumers’ report revealed that while Consumers continued to collect the surcharge for the Big Rock decommissioning fund because MCL 460.10d(1) precluded it from doing otherwise, Consumers was using the surcharge for general corporate purposes.

II. Proceedings in the Instant Case

On July 7, 2008, Consumers filed an application seeking approval of a reconciliation of the costs and revenues associated with the decommissioning of Big Rock. The application stated that Consumers completed the decommissioning process in 2007 and calculated an underrecovery of \$44.1 million in decommissioning costs. Consumers noted that the funding of the Big Rock decommissioning fund terminated on December 31, 2000, pursuant to the PSC’s order in Case No. U-11662. Consumers sought to recover \$44.1 from its customers via a surcharge.

On February 8, 2010, the PSC issued an order denying Consumers’ request to collect \$44.1 million from its customers via a surcharge, and requiring Consumers to refund \$85 million to those customers. The PSC rejected Consumers’ argument that 2000 PA 141 and prior PSC orders authorized Consumers to redefine the funds collected via the Big Rock surcharge as general corporate revenue after December 31, 2000. The PSC found that the regulatory framework for the operation of the decommissioning fund was established in the settlement agreement approved in 1986 in Case No. U-6150, and that the settlement agreement prohibited the use of trust funds for any purpose other than the decommissioning of Big Rock; no subsequent PSC order altered this framework. The PSC also rejected Consumers’ assertion that ordering a refund constituted retroactive ratemaking. The PSC concluded that the \$99.5 million in surcharge funds Consumers collected from 2001 through 2003 should have been placed in the decommissioning fund, and calculated that after appropriate interest rates were applied and the underrecovery of \$44.1 million was subtracted Consumers owed its customers a refund of approximately \$85 million. The PSC directed Consumers to file a computation of a negative surcharge to refund the excess funds over a period that was not to exceed 18 months.¹

II. Standard of Review

The standard of review for PSC orders is narrow and well defined. Pursuant to MCL 462.25, all rates, fares, charges, classification and joint rates, regulations, practices, and services

¹ Consumers filed the computation as directed, and in an order entered on April 27, 2010, the PSC approved Consumers’ refund plan. In a report filed with the PSC on February 15, 2011, Consumers indicated that it had refunded the monies as required and terminated the negative surcharge.

prescribed by the PSC are presumed, prima facie, to be lawful and reasonable. *Michigan Consol Gas Co v Pub Serv Comm*, 389 Mich 624, 635-636; 209 NW2d 210 (1973). A party aggrieved by an order of the PSC has the burden of proving by clear and convincing evidence that the order is unlawful or unreasonable. MCL 462.26(8). To establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow a mandatory statute or abused its discretion in the exercise of its judgment. *In re MCI Telecom Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999). An order is unreasonable if it is not supported by the evidence. *Associated Truck Lines, Inc v Pub Serv Comm*, 377 Mich 259, 279; 140 NW2d 515 (1966).

A final order of the PSC must be authorized by law and be supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *Attorney General v Pub Serv Comm*, 165 Mich App 230, 235; 418 NW2d 660 (1987).

We give due deference to the PSC's administrative expertise, and will not substitute our judgment for that of the PSC. *Attorney General v Pub Serv Comm No 2*, 237 Mich App 82, 88; 602 NW2d 225 (1999). We give respectful consideration to the PSC's construction of a statute that the PSC is empowered to execute, and we will not overrule that construction absent cogent reasons. If the language of a statute is vague or obscure, the PSC's construction serves as an aid to determining the legislative intent, and will be given weight if it does not conflict with the language of the statute or the purpose of the Legislature. However, the construction given to a statute by the PSC is not binding on us. *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103-109; 754 NW2d 259 (2008); see also *Great Wolf Lodge v Pub Serv Comm*, 489 Mich 27, 37-38; 799 NW2d 155 (2011). Whether the PSC exceeded the scope of its authority is a question of law that we review de novo. *In re Complaint of Pelland Against Ameritech Mich*, 254 Mich App 675, 682; 658 NW2d 849 (2003).

III. Analysis

On appeal, Consumers argues that the PSC's February 8, 2010, order directing it to refund \$85 million to its customers is unlawful and unreasonable because it violates the plain language of 2000 PA 141, violates applicable precedent of this Court, violates prior Commission orders, and violates the prohibition against retroactive ratemaking. We disagree.

MCL 460.10d(1), enacted by 2000 PA 141, froze rates that were "authorized or in effect as of May 1, 2000[.]" Consumers argues that the PSC erroneously concluded that the surcharge collected during the rate freeze period should have been placed in the decommissioning fund; thus, the PSC's order that Consumers was required to refund some \$85 million to its customers following the completion of the decommissioning process is unlawful and unreasonable. Consumers bases its position on its argument that while MCL 460.10d(1) required it to continue collecting the surcharge during the rate freeze period, the statute did not supersede the PSC's conclusion that the decommissioning fund would be adequately funded by December 31, 2000. Thus, Consumers was required to use the funds for general corporate purposes after December 31, 2000.

Consumers' argument disregards the fact that the procedure for funding the decommissioning of Big Rock was established in the settlement agreement approved by the PSC in 1986. The settlement agreement required Consumers to establish an external trust fund to

hold the monies to be used for the decommissioning of Big Rock. The settlement agreement provided that the monies deposited into the fund could be used for no purpose other than the decommissioning process, and that if funds remained after the decommissioning process was completed, the excess funds would be refunded to Consumers' customers. In an order entered on March 22, 1999, in Case No. U-1162, the PSC concluded that the Big Rock decommissioning fund would contain sufficient funds by December 31, 2000; Consumers filed a tariff sheet indicating that the Big Rock surcharge was authorized through December 31, 2000.

MCL 460.10d(1) froze rates in effect as of May 1, 2000, and prohibited an increase or decrease in rates during the freeze period. Therefore, as the PSC concluded in its order of August 4, 2000, in Case No. U-12464, Consumers was required to continue collecting the Big Rock surcharge during the freeze period. However, contrary to Consumers' argument, the PSC's conclusion in its order of February 8, 2010, that Consumers was required to continue placing the Big Rock surcharge into the decommissioning fund during the freeze period is not inconsistent with the plain language of MCL 460.10d(1). The statute froze rates, and thus superseded the PSC's order of March 22, 1999, but did not nullify the PSC's other orders related to the process for collecting the decommissioning trust funds. The settlement agreement required Consumers to place the decommissioning surcharge monies in the decommissioning fund; therefore, the decommissioning surcharge that Consumers was required to continue to collect during the freeze period should have been placed in the fund as well. Consumers correctly notes that had it done so the fund would have contained more monies than necessary to accomplish the decommissioning process. However, the settlement agreement contemplated that possibility, and provided that excess funds would be refunded to Consumers' customers. The PSC's order of February 8, 2010, does not violate MCL 460.10d(1).

Moreover, contrary to Consumers' argument, the PSC's order of February 8, 2010, does not violate this Court's decision in *Attorney General v Pub Serv Comm*, 249 Mich App 424; 624 NW2d 691 (2002). In that case, this Court held that 2000 PA 141 superseded certain statutory power supply cost recovery ("PSCR") provisions, and that the PSC properly dismissed a PSCR case that would have resulted in a refund because the refund would have caused an impermissible rate change during the freeze period. *Id.* at 433-437. In the instant case, however, Consumers continued to collect the decommissioning surcharge throughout the freeze period. The reconciliation of the decommissioning expenses and revenues took place after the freeze period ended. The reconciliation did not cause a change in rates during the freeze period. This Court's decision is inapplicable to the instant case.

Furthermore, the PSC's order of February 8, 2010, does not contradict the PSC's order of August 4, 2000, in Case No. U-12464, in which the PSC concluded that Consumers must continue to collect the Big Rock surcharge throughout the freeze period. This conclusion was mandated by the plain language of MCL 460.10d(1), which superseded the order of March 22, 1999, that authorized collection of the surcharge only through December 31, 2000. The order of August 4, 2000, did not nullify the settlement agreement. As noted, the settlement agreement required that all funds collected via the surcharge be placed in the decommissioning fund. The authorized refund comported with the settlement agreement.

Finally, the PSC's order of February 8, 2010, authorizing a refund does not constitute retroactive ratemaking. Retroactive ratemaking in utility cases is prohibited. *Detroit Edison Co*

v Pub Serv Comm, 416 Mich 510, 523; 331 NW2d 159 (1982). Utility rates are set on the basis of estimates of costs. When the estimates prove inadequate, the previously set rates cannot be changed to correct the error. The only step the PSC can take is to prospectively revise rates in order to better estimate costs. *Id.* The settlement agreement set out the procedure for reconciling decommissioning expenses and revenues, and specified that excess funds would be refunded to Consumers' customers. The PSC's order of February 8, 2010, did not change the amount of the surcharge collected from Consumers' customers. Rather, the order implemented a refund in accordance with the settlement agreement.

In sum, the settlement agreement and the PSC's subsequent orders set out the procedure for the collection of the Big Rock surcharge and the reconciliation of the decommissioning expenses and revenues. The enactment of MCL 460.10d(1) required Consumers to continue collecting the surcharge, notwithstanding the PSC's previous conclusion in its order of March 22, 1999 in Case No. U-11662 that the fund would be adequately funded by December 31, 2000. However, the enactment of MCL 460.10d(1) did not nullify the provisions in the settlement agreement requiring that all monies collected via the surcharge be placed in the fund and establishing the procedure for reconciling decommissioning expenses and revenues. At no time did Consumers seek authorization from the PSC to cease placing surcharge monies in the fund. Consumers was not entitled to act unilaterally to do so, and was not entitled to rely on the opinion of a PSC Staff member as authorization to do so. The PSC speaks through its orders. Consumers has not demonstrated by clear and convincing evidence that the PSC's February 8, 2010, order is unlawful or unreasonable. MCL 462.26(8).

Consumers also argues that the PSC's order of February 8, 2010, violates the terms of previously filed and approved tariffs. Consumers complied with the PSC's direction in the order of March 22, 1999, in Case No. U-11662 and filed a tariff sheet indicating that the Big Rock surcharge was effective through December 31, 2000; in addition, in conformance with the PSC's order of August 4, 2000, in Case No. U-12464 Consumers filed a tariff sheet indicating that although the Big Rock surcharge terminated as of December 31, 2000, the surcharge would continue to be collected and would be used for general corporate purposes. The PSC accepted the tariff sheet filed in conformance with the PSC's order of August 4, 2000, as evidenced by the PSC's stamp on the returned copy. Consumers asserts that the PSC's acceptance of the tariff sheet demonstrates the validity of Consumers' argument that the funds collected via the Big Rock surcharge after December 31, 2000, could be used for general corporate purposes. We disagree.

R 460.2021 pertains to the PSC's acceptance of filings, and provides in pertinent part:

(3) After accepting a filing, the commission shall return an electronically stamped copy of the utility's filing and a filing acceptance letter to the utility. The acceptance letter, the utility's transmittal letter, and the stamped copy of the filing returned to the utility signify that the commission accepted the filing.

MCL 460.57 provides in pertinent part:

A schedule shall not be operative unless and until it has been approved by the commission; nor shall any change be made in the schedules except upon approval of the commission.

On a tariff sheet filed on September 12, 2000, Consumers included the following language in a footnote:

Even though the Big Rock Nuclear Decommissioning Surcharge terminates December 31, 2000, the total charges remain the same thereafter due to the rate freeze provisions of 2000 PA 141.

The PSC's order of August 4, 2000, in Case No. U-12464 indicated that the enactment of MCL 460.10d(1) required that the Big Rock surcharge continue through the freeze period. The order did not specify that the monies collected via the surcharge could be used for general corporate purposes after December 31, 2000; specifically, the order did not alter the settlement agreement, which provided that all monies collected via the surcharge must be placed into the decommissioning fund. Consumers' reliance on R 460.2021 is misplaced. That is a clerical rule, and does not substitute for Commission approval under MCL 460.57. Moreover, at no time did the PSC enter an order approving the language in the tariff. MCL 460.57. The PSC's order of February 8, 2010, does not violate the terms of Consumers' tariff.

IV. Conclusion

The PSC's order of February 8, 2010, does not violate 2000 PA 141, applicable precedent of this Court, prior Commission orders, the prohibition against retroactive ratemaking, or the terms of previously filed and approved tariffs. The PSC's order is not unlawful or unreasonable. MCL 462.26(8).

Affirmed.

/s/ Jane M. Beckering
/s/ Donald S. Owens
/s/ Douglas B. Shapiro